No. 15715

United States
Court of Appeals
for the Ninth Circuit

VAUGHN CECIL COWELL, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—2-6-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

RICHARD D. HARRIS,

428 Henry Building,
Seattle 1, Washington,

Attorney for Appellant.

CHARLES P. MORIARTY,

U. S. Attorney,

MURRAY B. GUTERSON,

Asst. U. S. Attorney,
1012 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellee.

United States District Court, Western District of Washington, Northern Division

No. 49682

UNITED STATES OF AMERICA, Plaintiff,

vs.

VAUGHN CECIL COWELL, Defendant.

INFORMATION

The United States Attorney charges:

Count I.

That on or about February 13, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Vaughn Cecil Cowell did knowingly and unlawfully steal from a wharf, to wit, Pier 50, with intent to convert to his own use, goods moving as and which were a part of and which constituted an interstate shipment of freight and express, to wit, a quantity of vodka being shipped from Hartford, Connecticut, to Seattle, Washington, of a value not in excess of $100.

All in violation of Section 659, Title 18, U.S.C.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant Vaughn Cecil Cowell guilty as charged in Count I of the Information.

/s/ JOHN D. GRIGGS,
Foreman.

[Endorsed]: Filed July 9, 1957.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

* * * * *

6. The Court erred in charging the jury and in refusing to charge the jury as requested.

* * * * *

7. c. Court's comments on the evidence of the jury during its instructions.

* * * * *

/s/ RICHARD D. HARRIS,
Attorney for Defendant.

[Endorsed]: Filed July 11, 1957.

United States District Court, Western District of Washington, Northern Division

No. 49682

UNITED STATES OF AMERICA, Plaintiff,

vs.

VAUGHN CECIL COWELL, Defendant.

JUDGMENT AND COMMITMENT

On this 12th day of August, 1957 came the attorney for the government and the defendant appeared in person and with Richard D. Harris, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a jury verdict of guilty, of the offense of violation of Section 659, Title 18, U.S.C. as charged in Count I of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as to Count I and as to said Count I is convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Six (6)

Months in such institution as the Attorney General of the United States or his authorized representative may by law designate on Count I of the Information.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in Open Court this 12th day of August, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented by:

/s/ MURRAY B. GUTERSON,
Assistant United States Attorney.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The Appellant: Vaughn Cecil Cowell, 8615 12th SW, Seattle, Washington.

Appellant's Attorney: Richard D. Harris, 428 Henry Building, Seattle, Washington.

Offense: Violation of Section 659, Title 18, U.S.C.

The above named appellant, feeling aggrieved by the verdict, judgment, sentence, and denial of motion for new trial, hereby appeals from the same to

the United States Court of Appeals for the Ninth Circuit.

Dated this 15th day of August, 1957.

/s/ RICHARD D. HARRIS,
Attorney for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 39(b)(1) FRCrP, I am transmitting herewith the following original papers in the file dealing with the action as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1.A. Commissioner's Transcript, with warrant and bond attached, filed 4-3-57.

1. Information, filed 4-26-57.

2. Praecipe, government for 7 subpoenas in blank, filed 6-27-57.

3. Praecipe, deft. for subpoenas in blank, filed 7-6-57.

4. Plaintiff's Requested Instructions, filed 7-9-57.

5. Verdict, filed 7-9-57.

6. Marshal's returns on subpoenas, Linden, et al., filed 7-11-57.

7. Motion for New Trial filed July 11, 1957.

8. Marshal's return on subpoena, Bates, filed 7-19-57.

9. Judgment, Sentence and Commitment, filed 8-12-57.

10. Notice of Appeal, filed 8-15-57.

11. Bond on appeal, $500.00, Michigan Surety Company, filed 8-15-57.

Plaintiff's Exhibits Nos. 3 and 4. (Plaintiff's Exhibits 1 and 2, liquor exhibits, not sent up.)

Witness My Hand and Official Seal at Seattle this 13th day of September, 1957.

[Seal] MILLARD P. THOMAS,
Clerk,
/s/ By TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Seattle, Washington, Tuesday, July 9, 1957, 10:00 a.m.

Before: Honorable Gus J. Solomon, District Judge, with a jury.

Appearances: Mr. Murray B. Guterson, Assistant United States Attorney, appearing in behalf of United States of America; Mr. Richard D. Harris, Attorney for Defendant.

Court Reporter: Mr. Gordon R. Griffiths. [1]*

* * * * *

The Court: All witnesses are now excused from further attendance at the trial.

Mr. Harris: The last point is that there has been no testimony before this court or jury that Pier 50 is within the Northern Division of the Western District of Washington.

The Court: The motion is denied on all grounds. Do you have any additional requests other than that of an instruction on the accomplice?

Mr. Harris: No, I do not, your Honor. I would like to cite one case to your Honor in regard to the accomplice instruction.

The Court: What is it?

Mr. Harris: That is 217 U.S., page 509, page 523.

The Court: What does it say?

Mr. Harris: "It is further alleged that the court erred in refusing to give the following request."

The Court: What state did it come up from?

Mr. Harris: Well, it came out of the Eighth Circuit, as I recall.

The Court: Do you have a special rule in the State of Washington to the effect that the testimony of an accomplice must be corroborated?

Mr. Harris: No, I don't believe we do.

The Court: What does the case hold to that effect? [146] What is the purpose of citing the case?

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* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Harris: That it does indicate here that there should be an instruction — it is undoubtedly better practice for the Court to caution juries in reliance upon testimony of accomplices and to require corroborating testimony before giving credence to them.

The Court: I am not going to give that. I am going to instruct the jury that the testimony of the accomplice must be viewed with caution and weighed with great care, but that the testimony of an accomplice, if believed, is sufficient to establish any fact in the case.

(Thereupon, counsel for the respective parties made their arguments to the jury.) [147]

The Court: Ladies and gentlemen of the jury: The defendant was indicted under a law which provides in substance: whoever steals or unlawfully takes or carries away from any railroad car, motor truck or other vehicle, or from any station or depot or from any steamboat, vessel or wharf, with intent to convert to his own use, any goods or chattels moving as, or which are a part of or which constitute an interstate or foreign shipment of freight or express shall be guilty of a crime.

An Information was returned against the defendant under this law. It is very short, and I shall read it to you. It contains only one count. The United States Attorney charges, "That on or about February 13, 1957, at Seattle, Washington, within the Northern Division of the Western District of Washington, Vaughn Cecil Cowell did knowingly and unlawfully steal from a wharf, to wit, Pier 50,

with intent to convert to his own use, goods moving as and which were a part of and which constituted an interstate shipment of freight and express, to wit, a quantity of vodka being shipped from Hartford, Connecticut, to Seattle, Washington, of a value not in excess of $100.

"All in violation of Section 659, Title 18, United States Code."

To this Information the defendant entered a plea of not guilty. This plea of not guilty puts in issue each [148] and every material allegation of the Information. Although the Information is positive in its language, it is merely a formal charge of crime made by the United States Attorney. It is not evidence of any kind against the accused and does not create any presumption or inference of guilt. On the contrary, the law presumes the defendant to be innocent of any crime. This presumption of innocence continues throughout the trial and up until such time, if that time ever arrives, where the defendant is convicted to your satisfaction and beyond a reasonable doubt. The presumption of innocence has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The government must prove every essential element of the crime charged beyond a reasonable doubt. A defendant has the right to rely upon the failure of the government to establish such proof. In other words, a reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

A reasonable doubt is such a doubt that may exist in the mind of the ordinary, reasonable and prudent person after a full, fair and complete examination of all the facts and circumstances surrounding the crime charged. It must not be a mere possible doubt which is inconsistent [149] with evidence which the jury credits and believes, but it must be such a doubt as, in the graver and more important affairs of life, would cause the ordinary, reasonable and prudent person to pause and hesitate before acting upon the truth of the matter charged.

Absolute demonstration is not required; that is, proof to a mathematical certainty because such proof is rarely available. Moral certainty alone is required, or that degree of proof which produces conviction in the unprejudiced mind.

The material allegations of this Indictment are: First, that there must be a crime committed as charged in the Information; that is, there must have been a stealing of goods sent in interstate commerce. Second, that the defendant is the person, or one of the persons, who committed the crime, and, lastly, that the crime, if any, was committed in the Western District of Washington, Northern Division, and this includes Seattle, Washington. You have to find that this theft took place on a pier in the City of Seattle because that is the only place that was charged.

I want to point this out as a matter of comment, that the defendant is the only one here on trial. Neither the United States Attorney nor his deputy

nor the Federal Bureau of Investigation is on trial, and you need not determine whether the FBI agents who appeared here did a [150] good job or could have done a better job or did a better job. That is wholly extraneous to any issue in this case because you have no power to hire or discharge or promote any of these FBI agents or any other police officer. You have one duty and one duty alone, and that is to determine whether the defendant was guilty of a crime.

There was evidence concerning Mr. Linden's activities, and I will tell you about that also later as to the weight you can give his statement, but now I merely state that whether Mr. Linden is likewise guilty of a crime or Mr. Abel was guilty of some offense is not involved in this case, only to the extent of the credibility of those witnesses. I want to direct your attention once again to the fact that if you find beyond a reasonable doubt and to a moral certainty that the defendant is guilty of this crime, you should bring in a verdict of conviction regardless of whether other people might also be guilty of a crime and regardless of whether the Federal Bureau of Investigation people or other people might have done a bad or a good job.

In order the find the defendant guilty, the United States must prove certain elements.

First: That on or about February 13, 1957, at Seattle, Washington, the defendant stole from a wharf a quantity of vodka or one bottle of vodka.

Second: That this vodka was moving as and was a [151] part of an interstate shipment of freight and express.

Third: That the defendant took this vodka knowingly and unlawfully.

And, lastly: That the defendant took this vodka with the intent to convert it to his own use.

In order to find the defendant guilty, it is not necessary to find that he removed the goods in question to a place away from the wharf. It is only necessary to find that the defendant moved the goods some distance, however slight, from their proper place with intent to convert them to his own use.

Likewise, it is not necessary that the government prove that the defendant knew that the goods in question or the bottle of vodka was a part of an interstate shipment. It is only necessary that you find that it was in fact part of an interstate shipment.

In determining whether this vodka was a part of an interstate shipment during the night and morning of February 13, 1957, it is the law that a shipment does not lose its interstate character until it has been delivered to the consignee at its destination or until the carrier has surrendered control of said shipment to the consignee.

I have used certain words which I now desire to define for you. The word "convert" means to assume and exercise ownership over the goods and chattels of another [152] without authority so it is not necessary that the government prove that this defendant actually consumed this liquor for himself, but if he exercised control, dominion and ownership over the vodka by presenting it to someone,

then under the law he would have converted it to his own use. "Unlawfully" means contrary to law. Hence, to do and act unlawfully means to do something intentionally which is contrary to law. The word "knowingly" was added to insure that no one would be convicted because of mistake, inadvertence or other innocent reason.

In this connection I want to instruct you that there was some evidence that this defendant was drinking. I instruct you that voluntary intoxication is no defense to crime. However, I instruct you that if you find that at the time of the alleged theft, the defendant was so intoxicated that he was temporarily deprived of his reason and that he was incapable of having any intent to commit the act, then your verdict must be in favor of the defendant. Generally speaking, there can be no crime without a criminal intent, and you must find criminal intent in order to convict the defendant.

A person who knowingly does an act which the law forbids, purposely intending to violate the law, acts with specific intent. Intent may be proved by circumstantial evidence. It rarely can be established by any other means. [153] While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the act is done, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged for experience has taught us that actions often speak more clearly than written or spoken words. The jury should consider

all the facts and circumstances in evidence which may aid in the determination of the issue as to intent.

Any fact in this case may be proved by either direct or circumstantial evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. The direct evidence of the commission of a crime consists of testimony of every witness who with his own physical senses perceived any of the conduct constituting the crime charged and which testimony relates to what was thus perceived.

Other evidence admitted in the trial is circumstantial evidence. Circumstantial evidence is evidence of acts, declarations, conditions or other circumstances tending to prove a crime in question or tending to connect a defendant with the commission of such crime. In other words, it is proof of a chain of circumstances pointing to [154] the commission of crime. Circumstantial evidence sometimes may be stronger on account of inferences that may be drawn from it than the testimony of eyewitnesses. No greater degree of certainty is required when the evidence is circumstantial than when it is direct. The law makes no distinction between direct and circumstantial evidence but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

As you can see from the testimony, this case

bristles with issues of veracity. In instances too numerous to mention, the testimony of witnesses called by the government is flatly contradicted by the testimony of the defendant himself. It is your function, and yours alone, to determine where the truth lies. By what yardstick and in accordance with what rules of law are you to judge the credibility of witnesses, including that of the defendant? Every witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief, not only each witness' intelligence, motive, [155] state of mind and demeanor and manner while on the stand, but also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause a jury to discredit such testimony.

Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, particularly as to times, dates and places, is not an uncommon experience. In weighing the effect

of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail and whether the discrepancy results from innocent error or from willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, that you think it deserves. In other words, there is nothing peculiarly different in the way a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when making important decisions. You consider [156] whether the person with whom you are dealing had the capacity and opportunity to observe and be familiar with and remember the things he tells you about. You consider any possible interest he may have and any bias or prejudice. You consider the person's demeanor, and you decide whether he strikes you as fair and candid. In other words, you size him up. Then you consider the inherent believability of what he says and whether it accords with your own knowledge or experience. The same is true of witnesses. You ask yourself if they know what they are talking about. You watch them on the stand as they testify, and you note their demeanor, and you decide how their testimony strikes you.

Take the matter of interest, for example. You may feel that some witnesses, whether for the government or for the defense, have an interest in the outcome of the case. Where a witness has a strong personal interest in the result of the trial, the

temptation may be strong to color, pervert, or withhold the facts. Even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony. On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest has affected the witness. [157]

The greater a person's interest in the case the stronger is the temptation for false testimony, and the interest of the defendant is of a character possessed by no other witness. Manifestly, he has a vital interest in the outcome of the case. This interest is one of the matters which you must consider along with the other attendant circumstances in determining the credence you will give to his and their testimony.

What I have said concerning interest of a witness applies with equal force to the matter of bias and prejudice. Where you find that any witness has any bias or prejudice for or against any of the parties, you will consider whether and to what extent such bias and prejudice has affected his testimony. You will accordingly observe that before reaching any conclusion as to whether you will believe the testimony of any particular witness or the defendant or as to whether you will believe part of his testimony, the testimony of the witness or the defendant, and reject the rest. It is essential that you give consideration to all the circumstances bearing upon the question of credibility

of the particular witness as I have just indicated.

All evidence of a witness who is connected with the commission of the offense charged should be considered with caution and weighed with great care. One who is connected with the commission of an offense charged is [158] referred to as an accomplice. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain the verdict of guilty even though not corroborated or supported by other evidence, but I instruct you that before you may find a verdict of guilty on the unsupported evidence of an accomplice you must believe that evidence beyond a reasonable doubt and to a moral certainty. In other words, his testimony alone must establish the guilt beyond a reasonable doubt and to a moral certainty.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case; therefore, you are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number of a presumption or other evidence which does appeal to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from bias or prejudice. It does mean that you are not to decide an issue by the mental process of count-

ing the number of witnesses who have testified on opposing sides. It means [159] that the final decision is not the relative number of witnesses but in the relative force of the evidence.

In order to justify a verdict based in whole or in part upon circumstantial evidence, the facts in the case or circumstances shown by the evidence must be consistent with the guilt of the accused and inconsistent with every reasonable supposition of innocence. If the facts and circumstances shown by the evidence are as consistent with innocence as they are with guilt, the jury would acquit the accused. In fact, this rule of construction is applicable throughout the case. If the evidence in the case as to a defendant is susceptible to two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit the defendant's innocence and refuse that which points to his guilt. You will note that this rule of law applies only when both of two opposing conclusions appear to you to be reasonable. If on the other hand one of such conclusions appears to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in mind, however, that if the reasonable deduction points to the defendant's guilt the entire proof must carry the convincing force required [160] by law to support the verdict of guilty.

Under the law, I have certain functions which I have tried to lay down for you; that is, I am to instruct you as to what the law is and what law is to govern you in your deliberations. You on the other hand are to determine what the facts are. I have not tried to encroach upon your province, and I do not want you to encroach upon my province.

One of my other provinces is to determine what penalty or punishment should be meted out to the defendant, if you find him to be guilty; therefore, in your deliberations you are not to consider for any purpose whatsoever what the penalty or punishment might be if the defendant is found guilty. Remember you are judges, judges of the facts, and it is your duty to perform your duty in a nonpartisan manner.

You will have with you in the jury room the exhibits in the case. You will also have a form of verdict which reads, "We the jury duly empaneled, and sworn in the above-entitled cause find the defendant, Vaughn Cecil Cowell—" and then there is a blank space— "guilty as charged in Count 1 of the Information." If you find the defendant to be guilty, you will not insert anything in the blank space. If, on the other hand, you find the defendant not guilty, you will insert the word "not" in the blank space [161] before the word "guilty."

In the Federal Court the verdict must be unanimous; therefore, before you can find the defendant guilty each one of you must determine for yourself that the defendant is guilty beyond a reasonable

doubt and to a moral certainty. If you have done so, then the foreman, whoever he or she may be, will return this verdict and sign the name under the line "Foreman." If on the other hand all of you, all eleven of you come to the conclusion that the government has failed to prove its case beyond a reasonable doubt and to a moral certainty and that a verdict of not guilty is proper, in this case the foreman would sign his name to the verdict, the foreman alone, but I want to admonish the foreman, whoever he or she may be, before you sign your name to that verdict be sure that it represents the unanimous opinion of each of the jurors.

Once again I tell you that there is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense. Consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction. If the accused be proved guilty, say so; if not proved guilty, say so also by your verdict. [162]

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the crier, but bear in mind you are not to reveal to the Court or any person how the jury stands numerically or otherwise on the question of guilt or innocence until after you have reached your unanimous verdict.

There are some legal matters I would like to take up with counsel before the case is submitted to you so I suggest to counsel it might be simpler if you go into my chambers. [163]

* * * * *

Mr. Harris: I object to—I don't believe it was an instruction but a comment on the evidence which I believe was by the Court regarding the doing or failure to do a good job by the FBI or other investigative agencies and also following that immediately on Linden's guilt or Abel's guilt, as I followed your Honor, the instruction or comment, for the reason that there is no preface or qualification of the comment in its position amongst the instructions, advising the jury that the Court while under the federal rule is allowed to comment on the testimony, such comment is not to be taken by the jury as any evidence in the case and that they are the sole and exclusive judges in that.

The Court: Thank you for calling it to my attention. I will do it right now. [164]

* * * * *

Mr. Harris: The other exception is to the Court's instruction concerning the interest of the defendant in the outcome of this case being greater than that of any other witness in the particular case. In view of the fact that we do have one and possibly two accomplices whose interest would be at least tantamount to that of the defendant and the failure to so instruct the jury in that respect in that particular instruction of the case, the exception is taken.

One other is the definition on accomplice. I take

exception to that for the reason that the instruction by the [166] Court that no corroboration was necessary, that it is my contention that corroboration would be necessary when a case is based on the accomplices' testimony alone.

The Court: You may have the exception.

Mr. Harris: And the last is that the Court's emphasis that the jury must return either a guilty verdict or a not guilty verdict would lead them to believe that they had no alternate choice or legal right to disagree.

The Court: I will tell them that.

Mr. Harris: That is all.

Mr. Guterson: I have no exceptions.

(Thereupon, the following proceedings were had in open court before the jury and with defendant present with his counsel:)

The Court: Ladies and gentlemen, I told you that the function of the Judge or the Court, as we call it, is different from that of the jury, but my attention has been called to the fact that I failed to specifically point out that you are the sole and exclusive judges of the facts and the credibility of all witnesses, and the rules which I laid down for you are merely the rules which are to govern you in your deliberations of those facts. Under the law, a federal judge has the power to sum up the evidence and to suggest conclusions thereon either as to the guilt or innocence of a defendant or the credibility [167] of witnesses or any other feature in the case. I did not exercise that option

except in one instance for the purpose of telling you what I regarded to be extraneous evidence; that is, you will recall that I said the FBI is not on trial and neither is the United States Attorney, and the only fact in question was whether the defendant is or is not guilty. I made that as a part of a comment. You are not bound by that statement although I think it is a true statement.

One other thing to which my attention has been called. I told you that in order to bring in a verdict of guilty each of you must decide for yourself that the defendant is guilty, and, likewise, you may not return a verdict of not guilty unless all of you agree thereto. The question has been asked what do you do if you never get eleven people to agree, and I tell you that that has happened in the past, and we do not expect anyone to surrender an honest opinion he or she may have. There are cases where the jury returns and says, "We are unable to agree." In this connection, I want to give you a little additional advice. It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement if you can do so without a violation to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of [168] your deliberations, do not hesitate to reexamine your views and to change your opinion if convinced that it is erroneous, and do not surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of your fel-

low jurors or for the mere purpose of returning a verdict.

As to the attitude of jurors at the outset of their deliberations, it is seldom helpful for a juror upon entering the jury room to announce an emphatic opinion on the case or his determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when it is shown to be incorrect. Let me remind you you are not partisans. You are judges, judges of the facts, and your sole interest is to ascertain the truth. You will make a worthwhile contribution to the administration of justice if you arrive at an impartial verdict in this case.

Swear the bailiffs.

(The bailiff was thereupon sworn.)

(Thereupon, at 5:15 P.M. the jury retired to deliberate.)

(Thereupon, the following proceedings were had without the presence of the jury:)

The Court: You have an opportunity to make any further exceptions that you desire with reference to the [169] later remarks that I made.

Mr. Harris: The only other exception that I would take would be the last comment after you say that they were the sole judges on this issue of whether or not the FBI or somebody else was on trial, was your Honor's comment, "Although I think it is true." We take exception to that.

The Court: As I was giving that statement, I

felt that I appeared a little ridiculous because it is so obviously correct that this defendant is the only one on trial and the United States Attorney is not on trial and the FBI is not on trial, and that was a comment upon which I couldn't see any possible objection, and I did it because otherwise it would make me look a little ridiculous.

Mr. Harris: I might state that I did not make the objection by reason of any personal reference——

The Court: That is perfectly all right. Every one can take their exceptions. I want them to make their own record. [170]

* * * * *

[Endorsed]: Filed Oct. 17, 1957.

[Endorsed]: No. 15715. United States Court of Appeals for the Ninth Circuit. Vaughn Cecil Cowell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: September 16, 1957.

Docketed: September 19, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15715

VAUGHN CECIL COWELL, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant and submits the following statements of points upon which he intends to rely upon appeal.

1. That the appellant was improperly convicted and his motions for dismissal at the close of the Government's case and for acquittal at the conclusion of all the evidence were improperly denied.

2. That the verdict and conviction of the defendant was contrary to the weight of the evidence and not supported by substantial evidence.

3. That the Court erred in admitting into evidence certain Government exhibits, to-wit, Exhibits 1 and 2 to which timely and proper objections to their admissibility was made at the time of the trial.

4. That the Court erred in its instructions to the jury as regarding the testimony of an accomplice.

5. That the Court erred in failing to grant defendant's motion for a new trial based upon a state-

ment of the Assistant United States Attorney made in the presence of the jury concerning defendant's counsel's right to cross-examination of the witness, David Linden.

6. That the Court erred in admonishing defendant's counsel in the presence of the jury and in commenting on the evidence during its instructions to the jury.

Dated this 3rd day of October, 1957.

/s/ RICHARD D. HARRIS,
Attorney for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 4, 1957. Paul P. O'Brien, Clerk.